

ILLINOIS POLLUTION CONTROL BOARD
September 9, 2021

MIDWEST GENERATION, LLC (WILL)
COUNTY GENERATING STATION),)
)
Petitioner,)
)
v.) PCB 21-108
) (Variance - Land)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

OPINION AND ORDER OF THE BOARD (by C.M. Santos):

Midwest Generation, LLC (MG) owns and operates the Will County Electric Generating Station (Station), a power plant in Romeoville. At the Station, Ponds 1 North (1N) and 1 South (1S) collected coal ash from generating units before MG removed the ponds from service in 2010. On April 15, 2021, the Board adopted Part 845 of its rules, which regulates coal combustion residuals (CCR) surface impoundments including Ponds 1N and 1S. MG maintains that CCR rules adopted in 2015 by the United States Environmental Protection Agency (USEPA) do not apply to Ponds 1N and 1S, so it does not have the groundwater monitoring network and information needed to timely comply with specified requirements of Part 845.

On May 11, 2021, MG requested that the Board grant a variance extending six specified deadlines for Ponds 1N and 1S. MG argues that it requires additional time to gather data and submit complete information to comply with Part 845. The Illinois Environmental Protection Agency (IEPA) recommended that the Board deny two of MG's requests, which MG then agreed to withdraw. For the four pending requests, IEPA neither supports nor opposes extending the deadlines to collect and analyze groundwater data, submit an initial operating permit, designate a closure priority category, and submit a construction permit application if one is necessary. For the reasons below, the Board finds that immediate compliance with the four specified deadlines would impose an arbitrary or unreasonable hardship and grants MG variances with conditions.

Below, the opinion first summarizes the procedural history and provides background on the Will County Station. The Board then addresses the regulations from which MG seeks variances. Next, the opinion summarizes variances generally, the regulatory background for MG's requests, IEPA's recommendation, and MG's response. It then separately discusses each of the four requirements from which MG seeks relief, including MG's compliance alternatives, its requested relief, and its arguments that immediate compliance would constitute an arbitrary or unreasonable hardship. The Board then addresses the issues of compliance costs, impact on the public or environment, and consistency with federal law. Finally, the Board considers MG's proposed variance conditions before reaching its conclusion to grant the requested variances with conditions and issuing its order.

PROCEDURAL HISTORY

On May 11, 2021, MG filed its variance petition (Pet.), which requested that the Board hold a hearing (Pet. at 24). Attached to the petition were a motion for expedited review and 16 exhibits:

- Pet. Exh. A: IEPA Statement of Reasons, Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Mar. 30, 2020);
- Pet. Exh. B: Excerpt of Hearing Transcript, Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Aug. 11, 2020);
- Pet. Exh. C: Excerpt of Hearing Transcript, Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Aug. 13, 2020);
- Pet. Exh. D: Affidavit of Bradley Castle, Operations Manager, Will County Generating Station;
- Pet. Exh. E: IEPA Compliance Commitment Agreement, 2012;
- Pet. Exh. F: Drawings of Pond 1N and 1S Modifications;
- Pet. Exh. G: 2009 Hydrogeological Assessment of MG Electric Generating Stations;
- Pet. Exh. H: Will County Ponds, 1977 drawings;
- Pet. Exh. I: Affidavit of Richard Gnat, KPRG & Associates, Inc. (KPRG);
- Pet. Exh. J: KPRG Map of Well Locations;
- Pet. Exh. K: KPRG Cost Estimates;
- Pet. Exh. L: KPRG Regulation Compliance Timeline (Groundwater Monitoring);
- Pet. Exh. M: Prefiled Testimony of Richard Gnat, Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R 20-19 (Aug. 27, 2020), including Attachment 4, Excerpts from USEPA Statistical Analysis of Groundwater Monitoring Data at RCRA Facilities – Unified Guidance March 2009 (EPA-530-R-09-007);
- Pet. Exh. N: KPRG Regulation Compliance Timeline (Operating Permit);
- Pet. Exh. O: KPRG Proposed Compliance Schedule (Groundwater Monitoring); and
- Pet. Exh. P: KPRG Proposed Compliance Schedule (Operating Permit).

On May 20, 2021, the Board granted MG’s motion for expedited review. On May 21, 2021, MG waived its decision deadline to September 10, 2021. *See* 415 ILCS 5/38(a) (2020); 35 Ill. Adm. Code 104.232.

On June 1, 2021, MG filed a certificate of publication of notice in the *Joliet Herald-News* on May 17, 2021. On June 17, 2021, the Board found that MG had provided timely publication of notice and accepted MG’s petition for hearing. *See* 35 Ill. Adm. Code 104.214(d).

On June 24, 2021, IEPA filed a motion to extend the deadline to file its recommendation to July 1, 2021. On June 28, 2021, the hearing officer granted the motion and also extended the deadline for MG to respond by four days. On July 1, 2021, IEPA filed its recommendation

(Rec.). See 415 ILCS 5/37(a) (2020); 35 Ill. Adm. Code 104.216(b). Attached to the recommendation were 12 exhibits:

- Rec. Exh. A: IEPA Violation Notice No. W-2012-00058 (June 11, 2012);
- Rec. Exh. B: Sierra Club, et al. v. Midwest Generation, LLC, PCB 13-15 (June 20, 2019);
- Rec. Exh. C: Hydrogeologic Assessment Report (Feb. 2011);
- Rec. Exh. D: Affidavit of Melinda Shaw, Environmental Protection Geologist in Hydrogeology and Compliance Unit of Groundwater Section, IEPA Bureau of Water;
- Rec. Exh. E: Quarterly Groundwater Monitoring Report (Apr. 26, 2021);
- Rec. Exh. F: IEPA Invoice for CCR Surface Impoundments at Will County Station (Dec. 16, 2019);
- Rec. Exh. G: IEPA letter to MG re: invoices (Mar. 24, 2020);
- Rec. Exh. H: MG letter to IEPA Accounts Receivable (Mar. 18, 2021);
- Rec. Exh. I: IEPA letter to MG re: Development of Groundwater Monitoring Plan (Apr. 10, 2009);
- Rec. Exh. J: MG Groundwater Management Zone application (Jan. 18, 2013);
- Rec. Exh. K: NPDES Permit No. IL0002208 issued May 15, 2014, and modified Apr. 24, 2017; and
- Rec. Exh. L: Affidavit of Darin E. LeCrone, Manager of Permit Section in Division of Water Pollution Control, IEPA Bureau of Water.

On July 15, 2021, MG responded to IEPA's recommendation (Resp.). See 35 Ill. Adm. Code 104.220(a). In an order on July 22, 2021, the Board's hearing officer submitted written questions to the parties (Board Questions).

On July 27, 2021, the Board held a hearing on MG's petition in Joliet. The Board received the transcript (Tr.) on July 30, 2021. Five witnesses testified at hearing: Mr. Bradley Castle, Mr. Richard Gnat, and Ms. Sharene Shealy for MG and Mr. Darin LeCrone and Ms. Melinda Shaw for IEPA. At hearing, MG offered five exhibits, which the hearing officer admitted without objection:

- Pet. Exh. R¹: Letter dated February 14, 2017, to IEPA regarding Fugitive Dust Operating Program;
- Pet. Exh. S: Illinois Ambient Air Monitoring 2022 Network Plan;
- Pet. Exh. T: Letter dated July 15, 2009 from MG to IEPA;
- Pet. Exh. U: IEPA's Pre-Filed Answers, Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Aug. 3, 2020); and
- Pet. Exh. V: IEPA List of CCR Surface Impoundments.

On August 9, 2021, MG filed its post-hearing brief (MG Brief).

¹ After MG submitted Exhibits A through P with its petition, at hearing it offered exhibits beginning with the designation R. The Board's record does not include a Petitioner's Exhibit Q.

BACKGROUND ON WILL COUNTY STATION

History and Location

The Will County Station “began operations as a coal-fired power plant with two coal-burning units in 1955, with third and fourth units added in 1957 and 1963, respectively.” Pet. at 7, citing Pet. Exh. D at 1 (¶4); *see* 35 Ill. Adm. Code 104.204(b)(1). MG has owned and operated the Station since 1999. Pet. at 7, citing Pet. Exh. D at 1 (¶5). The Station “currently employs approximately 45 people.” Pet. at 7, citing Pet. Exh. D at 1 (¶6); *see* 35 Ill. Adm. Code 104.204(b)(5).

In its written questions, the Board noted that 35 Ill. Adm. Code 104.204(b)(1) requires the petitioner to provide the location of the facility. Board Questions at 1 (¶1). While MG provided a general location (Pet. at 7, citing Pet. Exh. D), it had not provided an address. The Board requested that MG provide the address. Board Questions at 1 (¶1). Mr. Castle’s testimony confirmed that the address of the Will County Station is 529 East Romeo Road in Romeoville. Tr. at 12.

The Board also noted that 35 Ill. Adm. Code 104.204(b)(1) requires the petitioner to provide the area affected by the facility. The Board requested that MG describe that area, including the location of any potable wells, surface waters, and groundwater. Board Questions at 1 (¶1).

Mr. Gnat’s testimony identified two potable water wells in the Station’s area within a 2500-foot radius of the CCR surface impoundments, one to the north and one to the east. Tr. at 35-36; *see* Pet. Exh. T at 13. He testified that both are production wells owned by MG and constructed to a depth of approximately 1500 feet. Tr. at 36. Because the database lists wells by latitude and longitude, a process of “field-truthing” can determine whether listed well locations are accurate. *Id.* at 61-62. Mr. Gnat acknowledged that the search indicated other potable water wells. *Id.* at 36. Noting that one of them is within a surface impoundment, Mr. Gnat suggested that these other wells are incorrectly located in the database. *Id.* at 35-36.

Ms. Shaw testified that she had conducted a potable well survey relying on the publicly available Source Water Assessment Protection Program. Tr. at 100; *see* Rec. Exh. D at 7 (¶28). The survey did not locate any potable well downgradient from Ponds 1N and 1S. Tr. at 100. Ms. Shaw characterized the two wells identified by MG as non-transient non-community water supply (NTNCWS) wells. *Id.* at 100-01; *see* Rec. Exh. D at 7 (¶28). Based on the 1500-foot depth of those wells and the existence of a confining geological layer between the uppermost aquifer and the lower groundwater supplying the wells, Ms. Shaw testified that “the likelihood of impact from the Will County CCR surface impoundments is low.” Rec. Exh. D at 7 (¶28); Tr. at 101.

Mr. Gnat testified that surface water in the vicinity of the Station includes the Chicago Sanitary and Ship Canal to the east and the Des Plaines River to the west. Tr. at 36. He also testified that the Station’s permitted discharge goes through an outfall to the canal. *Id.* Mr. Gnat added that groundwater flow in the area near Ponds 1N and 1S is to the west. *Id.*

Ponds 1N and 1S

Ponds 1N and 1S were constructed in 1977. Pet at 7, citing Pet. Exh. D at 1 (¶7). “Both ponds collected the bottom ash fines from Units 1 and 2.” Pet. at 7, citing Pet. Exh. D at 1 (¶8). MG collected most of the bottom ash from the units on a concrete retention pad next to the ponds and then took it offsite for beneficial use. Pet. at 7-8, citing Pet. Exh. D at 1 (¶8). In 2002, MG shut down Units 1 and 2 and removed Ponds 1N and 1S from service. Pet. at 8, citing Pet. Exh. D at 1 (¶9). After it removed them from service, MG states that Ponds 1N and 1S “did not collect either ash or process water.” Pet. at 8, citing Pet. Exh. D. at 2 (¶11).

In its recommendation, IEPA states that it identified Ponds 1N and 1S as CCR surface impoundments because their design and use threaten groundwater contamination. Rec. at 9. IEPA cites testimony in PCB 13-15, Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment v. Midwest Generation, LLC, in which complainants alleged groundwater contamination from coal ash ponds at MG stations including Will County. IEPA argues that testimony in that case indicates that the ponds “still contained CCR, are not capped, and allow for one foot of water in them.” *Id.*, citing Rec. Exh. B at 56. MG responds that it contests many of the Board’s findings on liability in its interim order in that case and “does not yet have the right to file an appeal to pursue those challenges.” Resp. at 4.

IEPA argues that it “has consistently considered Ponds 1N and 1S as CCR surface impoundments.” Rec. at 9, citing Rec. Exhs. F, G; Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R 20-19, slip op. at 141, 181-82 (Aug. 3, 2020) (prefiled answers). IEPA also notes that MG “submitted its CCR surface impoundment fee in March 2021, acknowledging Ponds 1N and 1S to be CCR surface impoundments.” Rec. at 9, citing Rec. Exh. H.

Pollution Control Equipment

Ponds 1N and 1S “were constructed with a 36-inch poz-o-pac liner, which remains in place.” Pet. at 8, citing Pet. Exh. D at 1, 2 (¶¶7, 12). MG characterizes poz-o-pac as an aggregate similar to concrete. Pet. at 8, citing Pet. Exh. G. MG elaborates that the liner consists of six layers, the bottom two six inches each of poz-o-pac, the middle two six inches each of poz-o-pac surrounding 12 inches of fill, and the top two six inches each of poz-o-pac. Pet. at 8, citing Pet. Exh. H; *see* 35 Ill. Adm. Code 104.204(b)(6), (b)(7).

In its recommendation, IEPA cites the Board’s order in PCB 13-15 finding that poz-o-pac liners at the Station can occasionally crack and suffer damage. Rec. at 6-7, citing Rec. Exh. B at 55. The order also stressed MG’s acknowledgment that the 40-year-old poz-o-pac liners in Ponds 1N and 1S “are in poor condition.” Rec. at 7, citing Rec. Exh. B at 56. IEPA also cites the Board’s finding “that it is more likely than not that the ash ponds and the material from those ash ponds did leach contaminants into the groundwater.” Rec. at 7, citing Rec. Exh. B at 55.

IEPA argues that a hydrogeologic assessment of the Stations shows the bottom of Pond 1N is at least one foot below average groundwater elevation. Rec. at 7, citing Rec. Exh. C

(Figure 4, Table 3). IEPA cites quarterly groundwater monitoring reports to argue that “[t]he groundwater elevation surrounding Ash Pond 1N only occasionally falls below a portion of the bottom of the impoundment.” Rec. at 7, citing Rec. Exh. D. IEPA asserts that, “if the poz-o-pac liner is cracked or otherwise compromised, contaminants can continue to leach into the groundwater.” Rec. at 7. It argues that “the cracks in the liners of Ponds 1N and 1S allow groundwater to flow into the surface impoundments and for CCR constituents to leak out into the groundwater.” *Id.* at 8, citing Rec. Exh. B at 56.

IEPA cites the Board’s order in PCB 13-15 stating the groundwater has flowed into and out of poz-o-pac liners at Ponds 1N and 1S carrying coal ash constituents. Rec. at 8, citing Rec. Exh. B at 56. IEPA argues that this contamination from an impoundment can continue after CCR is removed from it. Rec. at 8, citing Rec. Exh. D. It cites the most recent groundwater monitoring report, which shows exceedances of Class I groundwater quality standards downgradient of Ponds 1N and 1S. Rec. at 8, citing 35 Ill. Adm. Code 620.410, Rec. Exh. E.

Under a Compliance Commitment Agreement (CCA) with IEPA, MG in 2013 “implemented a dewatering system for Ponds 1N and 1S.” Pet. at 8, citing Pet. Exhs. D at 2 (¶10), E at 3 (§ 5(e)). Under the agreement, water in the bottom of the two ponds cannot exceed a depth of one foot. *Id.* The dewatering system drains liquid from the two ponds to the Station’s wastewater treatment plant so that stormwater accumulations do not exceed the one-foot depth limit. Pet. at 8; citing Pet. Exhs. D at 2 (¶13), F. After the plant treats wastewater, it “is either recycled back to the Station or discharged via one of the Station’s NPDES permitted outfalls.” Pet. at 8, citing Pet. Exh. D at 2 (¶14); *see* 35 Ill. Adm. Code 104.204(b)(2).

In its recommendation, IEPA asserts that “Ponds 1N and 1S are not closed.” Rec. at 6. IEPA argues that they are instead “inactive CCR surface impoundments” subject to the requirements of Part 845, “except as provided in Section 845.170, which is specific to inactive closed surface impoundments.” *Id.* at 5-6, citing 35 Ill. Adm. Code 845.100(d), 845.170.

IEPA acknowledges that MG executed a CCA that removed Ponds 1N and 1S from service and implemented a dewatering system that limits the depth of water to one foot above the bottom of the ponds. Rec. at 6, citing Rec. Exhs. A, E. IEPA states that “[t]he dewatering system is gravity driven and, by design, does not drain unless the water level is cresting above the one-foot water limit.” Rec. at 6, citing Rec. Exh. F. IEPA argues that the ponds “can, and likely do, contain one foot or more of water much of the time” and that this water “will likely saturate at least a portion of any CCR that remains.” Rec. at 6; *see* Rec. Exh. B at 56.

In its questions, the Board asked MG to “provide the volume of liquids held in the ponds based on the 1-foot depth.” Board Questions at 1 (¶3). Mr. Castle testified that MG installed the dewatering system solely because of precipitation that enters the open-air ponds. Tr. at 16. The inlet that drains liquid from the ponds is at “a low point on the side” of the pond toward which water flows. *Id.* at 28; *see id.* at 15-16, citing Pet. Exh. F at C-3. Mr. Castle testified that he had not seen water standing in the ponds and that MG does not maintain a 12-inch head in them. *Id.* at 18. The Board also asked MG to “provide the annual amounts of liquids drained from the ponds to the Station’s wastewater treatment plant.” Board Questions at 1 (¶3). Mr. Castle

testified that MG has not measured the amount of liquid drained from these ponds. Tr. at 17. He added that this measurement is not required by the Station's permit. *Id.*

Permits and Variances for the Station

MG "has not previously petitioned the Board for a variance concerning an extension of time to collect data or to submit a permit application." Pet. at 9; *see* 35 Ill. Adm. Code 104.204(b)(3). MG states that "there will be no impact to any of the Will County Station's permits." Pet. at 9; *see* 35 Ill. Adm. Code 104.204(b)(4).

IEPA's recommendation must include "[t]he status of any permits or pending permit applications that are associated with or affected by the requested variance." 35 Ill. Adm. Code 104.216(b)(8). IEPA reports that the Will County Station and the CCR surface impoundments there are regulated by an NPDES permit. Rec. at 24, citing Rec. Exh. K. IEPA adds that there are no other IEPA water permits now in effect at the Station. Rec. at 24. IEPA concludes that "[g]ranting any of the Petitioner's variance requests will not impact the NPDES permit." *Id.*

IEPA stated that MG's petition affects applications for operating and construction permits for Pond 1N and 1S. Pet. at 25. However, the requested relief "will not impact the operating and construction permit applications for any other CCR surface impoundment located at the Will County Station, provided that the facility-wide plans submitted with those applications are complete." *Id.*

Past or Pending Enforcement Actions

IEPA's recommendation must include "[a]llegations of any other facts the Agency believes relevant to the disposition of the petition, including any past or pending enforcement actions against petitioner." 35 Ill. Adm. Code 104.216(b)(4). In addition to a 2012 violation notice alleging violations of groundwater quality standards (Rec. Exh. A), IEPA cites a citizen enforcement action brought by environmental groups in 2012. An interim opinion and order in that case found that MG violated the Environmental Protection Act (Act) and groundwater quality regulations at the Station. Rec. at 11, citing Sierra Club, et al. v. Midwest Generation, LLC, PCB 13-15 (June 20, 2019); Rec. Exh. B. As noted above, MG contests Board findings on liability in the Board's interim order in that case and "does not yet have the right to file an appeal to pursue those challenges." Resp. at 4.

IEPA also cites violation notices it issued to MG on July 28, 2020, and December 16, 2020, "for failure to pay fees related to Ponds 1N and 1S." Rec. at 11. IEPA reports that MG has paid the fees, and it considers the matters resolved. *Id.* IEPA is "not aware of any other past or pending enforcement actions relevant to MWG's operation of CCR surface impoundments at the Will County Station." *Id.*

Air Monitoring

IEPA's recommendation must include "[t]he location of the nearest air monitoring station maintained by the Agency where applicable." 35 Ill. Adm. Code 104.216(b)(2). IEPA asserts

that “[t]his requirement is not applicable in this matter.” Rec. at 4. In its questions, the Board asked MG to comment on whether the location of an air monitoring station “has any bearing on measuring the impact of fugitive dust emissions from the facility.” Board Questions at 1 (¶2). Mr. Castle testified that the nearest air monitoring station is a PM_{2.5} monitor located at an elementary school in Joliet. Tr. at 22, citing Pet. Exh. S at 13. He testified that this monitor would not detect fugitive dust from the Will County Station because its fugitive dust plan prevents it from leaving the Station. Tr. at 22.

Performance Bond

Under Section 36(a) of the Act, “[i]f the hardship complained of consists solely of the need for a reasonable delay in which to correct a violation of this Act or of the Board regulations, the Board shall condition the grant of such variance upon the posting of sufficient performance bond or other security to assure the completion of the work covered by the variance.” 415 ILCS 5/36(a) (2020); *see* 35 Ill. Adm. Code 104.246, Rec. at 5. IEPA’s recommendation must include facts it “believes are relevant to whether the Board should condition a grant of variance on the posting of a performance bond under Section 104.246.” 35 Ill. Adm. Code 104.216(b)(9); *see* Rec. at 5.

IEPA stresses that the CCR surface impoundment regulations include “financial assurance for closure, post-closure care, and corrective action, all of which would include associated groundwater monitoring requirements.” Rec. at 11, 26-27; *see* 35 Ill. Adm. Code 845.Subpart I. Based on these provisions, IEPA concludes that “the Board should not have to condition the grant of a variance on any additional performance bond.” Rec. at 11, 27.

STANDARDS FROM WHICH MG SEEKS RELIEF

In the following subsections of the opinion, the Board first provides a brief summary of variances under the Act and the regulatory background for MG’s requests. Next, the Board summarizes IEPA’s recommendation and MG’s response. The Board then separately discusses the four requirements from which MG requests relief. For each of them, the Board addresses MG’s compliance alternatives, its requested relief, and its arguments that immediate compliance would constitute an arbitrary or unreasonable hardship before discussing the issues presented.

Variations Generally

A “variance is a temporary exemption from any specified rule, regulation, requirement or order of the Board.” *See* 415 ILCS 5/35(a) (2020); 35 Ill. Adm. Code 104.200(a)(1). Under the Act, the Board “may grant individual variances beyond the limitations prescribed in this Act, whenever it is found, upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship.” 415 ILCS 5/35(a) (2020); *see* 35 Ill. Adm. Code 104.200, 104.208, 104.238. The Board is authorized to grant a variance only to the extent consistent with applicable federal law and only for up to five years. *See* 415 ILCS 5/35, 36(b) (2020). In granting a variance, the Board may impose conditions that promote the policies of the Act. *See* 415 ILCS 5/36(a) (2020).

The burden of proof is on the petitioner. *See* 415 ILCS 5/37(a) (2020); 35 Ill. Adm. Code 104.200(a)(1), 104.238(a). The petitioner must prove that timely compliance with the Board rule or order would cause an arbitrary or unreasonable hardship that outweighs the public interest in timely compliance with the rule or order. *See Willowbrook Motel v. IPCB*, 135 Ill. App. 3d 343, 349-50 (1st Dist. 1985); Rec. at 11.

Regulatory Background

Section 22.59(g) of the Act required IEPA to propose and the Board to adopt standards for CCR surface impoundments. Pet. at 4, citing 415 ILCS 5/22.59(g) (2020); Public Act 101-171, eff. July 20, 2019; Pet. Exh. A (IEPA Statement of Reasons). On April 15, 2021, the Board adopted Part 845 of its rules, which includes the deadlines that are the subject of MG's petition. Pet. at 4, citing Standards for the Disposal of Coal Ash Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Apr. 15, 2021); *see* 45 Ill. Reg. 5884 (May 7, 2021); Rec. at 1.

Before the Board adopted Part 845, "CCR surface impoundments were regulated by the federal CCR rule." Pet. at 5; *see* 40 CFR 257. MG argues that Part 845 follows the federal rule but differs significantly in several areas. Pet. at 5. MG elaborates that the definition of "CCR surface impoundment" in Part 845 applies "more broadly to encompass ponds that are not regulated as CCR surface impoundments under the federal CCR rule." Pet. at 5, citing 40 CFR 257.73; 415 ILCS 5/3.143 (2020).

For CCR surface impoundments regulated by the federal rules, MG argues that owners and operators have collected data needed to comply with deadlines in Part 845. Pet. at 5. However, "this is not the case for Ponds 1N and 1S and other ponds not regulated by the federal CCR rule." *Id.* Because these two ponds "were removed from service in 2010 and dewatered in 2013," MG states that the 2015 federal CCR rules did not regulate them. *Id.* at 2, n.2, citing 80 Fed. Reg. 21342 (Apr. 17, 2015); Pet. Exh. D (¶15). Consequently, MG argues that ponds such as 1N and 1S do not "have the necessary monitoring wells infrastructure in place, let alone years of accumulated groundwater data and other technical information that is required to satisfy requirements of the Illinois CCR Rule." Pet. at 5. MG asserts that IEPA recognized this category of impoundments and acknowledged that they may not have collected data needed to comply with Part 845. *Id.* at 5, citing Pet. Exh. B at 74, Pet. Exh. C at 140-41.

In the Board's rulemaking, MG's post-hearing brief proposed to extend the groundwater monitoring deadline for impoundments such as Ponds 1N and 1S that had not been subject to the federal CCR rule. Pet. at 5, n.5, citing Standards for the Disposal of Coal Ash Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 4-6 (Oct. 30, 2020). MG sought an extended deadline "to collect the same number of independent samples as had been required for existing CCR surface impoundments regulated by the federal CCR rule." Pet. at 5-6, citing 40 CFR 257.94(b). However, the Board's second-notice proposal included a 180-day deadline to collect groundwater samples and a six-month deadline to apply for an operating permit. Pet. at 5, citing Standards for the Disposal of Coal Ash Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 24, 71 (Feb. 4, 2021).

MG argues that the Board recognized that site-specific factors may warrant extended deadlines. It further argues that the Board encouraged owners and operators with site-specific factors to seek a variance. Pet. at 6, citing Standards for the Disposal of Coal Ash Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 25 (Feb. 4, 2021).

IEPA Recommendation

When it receives a petition for a variance, IEPA must “promptly investigate” it and “consider the views of persons who might be adversely affected by the grant of a variance.” 415 ILCS 5/37(a) (2020). IEPA must also “make a recommendation to the Board as to the disposition of the petition.” *Id.*; see 35 Ill. Adm. Code 104.216(b); Rec. at 26.

IEPA’s recommendation does not either support or object to MG’s “request to extend its deadlines for completing its background groundwater sampling and submitting its operating permit application, category designation, and construction permit application for Ponds 1N and 1S.” Rec. at 26; see *id.* at 1, 4, 23.

However, IEPA recommended that the Board deny MG’s “request to extend its deadlines to complete the fugitive dust control plan and emergency action plan.” Rec. at 26; see *id.* at 1, 4, 18, 23. IEPA stated that the Board’s rules “specify that fugitive dust control plans and emergency action plans are for a facility, not individual CCR surface impoundments.” *Id.* at 17, citing 35 Ill. Adm. Code 845.500(b)(4). 845.520(c). IEPA noted that MG operates other impoundments at the Station for which it must prepare these plans by October 30, 2021. Rec. at 17. IEPA indicated that, “[i]f Ponds 1N and 1S require any special operational considerations regarding the facility’s fugitive dust and emergency action plan, they should amount to minor additions to the facility’s overall plans. *Id.*

MG Response

IEPA’s recommendation argued that extending the deadline to submit emergency action and fugitive dust plans “is unnecessary.” Rec. at 18. Based on IEPA’s objection, MG agreed “to withdraw its request to extend the deadline to complete the initial emergency action plan and the fugitive dust plan.” Resp. at 1; see Tr. at 8.

Section 845.650(b)(1)(A): Groundwater Monitoring

MG seeks a variance from Section 845.650(b)(1)(A), which addresses monitoring and analysis and provides that,

[f]or existing CCR surface impoundments, a minimum of eight independent samples from each background and downgradient well must be collected and analyzed for all constituents with a groundwater protection standard listed in Section 845.600(a), calcium, and turbidity within 180 days after April 21, 2021 [the effective date of Part 845]. 35 Ill. Adm. Code 845.650(b)(1)(A); see Pet. at 1, 6.

MG's Compliance Alternative

Installing Groundwater Monitoring Network. To meet the October 18, 2021 deadline to collect and analyze these samples, MG must first install a groundwater monitoring network for Ponds 1N and 1S that meets the requirements of Part 845. Pet. at 9, citing 35 Ill. Adm. Code 845.630. MG argues that, because Ponds 1N and 1S were not subject to the federal CCR rules, they did not have in place a monitoring well system complying with Section 845.630(c). Pet. at 10, citing Pet. Exh. I (¶4). MG reports that, although in 2010 it had installed six monitoring wells around the ponds, it needed to install three new monitoring wells to meet the requirement that there be at least three downgradient wells for each pond. Pet. at 10, citing 35 Ill. Adm. Code 845.630(c); Pet. Exhs. J, K; Tr. at 38, 45-46.

MG began installing the required new wells before Part 845 took effect. Pet. at 10. To install the new wells, “the site had to be cleared/grubbed and an existing fence moved to make room for the well drilling equipment.” *Id.* Once installed, the wells “had to be developed and surveyed.” *Id.* MG completed installation on April 28, 2021, and then installed dedicated well pumps on May 3, 2021. *Id.*, citing Pet. Exh. I (¶¶6, 7); Tr. at 38-39.

Collecting Samples. MG must then “collect eight independent samples to establish the representative background concentrations.” Pet. at 9. MG argues that meeting the October 18, 2021 deadline to collect and analyze samples “would require taking a sample about every 14 to 17 days.” *Id.* at 10, 12, citing Pet. Exh. L. Because it would compress sampling between May and September, MG argues that it could not capture seasonal variations. Pet. at 11, citing Pet. Exhs. I (¶11), L, M at 11. MG also argues that independent samples must be separated by enough time to ensure that they are not sampling what is effectively the same groundwater. Pet. at 11. If samples are too close to one another in time, it can result in autocorrelated data, which MG characterizes as “data that is similar between measurements as a function of time between the measurements.” *Id.*, citing Pet. Exh. M at 12. MG argues that the sampling deadline does not provide enough time to collect samples that are genuinely independent. Pet. at 12, citing Pet. Exhs. I (¶¶ 11, 12), M at 11.

Analyzing Samples. MG must then analyze the sample results for each constituent listed in 35 Ill. Adm. Code 845.600. Pet. at 9. MG reports that “[i]t typically takes 14 to 21 days to receive the laboratory analytical results for the required parameters” and that radium data may require 30 or more days. Pet. at 10, citing Pet. Exh. I (¶14). MG argues that it must receive all results, including radium data, by October 10, 2021, in order to meet the 180-day deadline in Section 845.650(b)(1). Pet. at 10, citing Pet. Exh. L.

Completing Statistical Evaluation. MG must then “complete a statistical evaluation based on all monitoring results and develop site specific groundwater protection standards for subsequent data comparisons and evaluations.” Pet. at 9; *see* Tr. at 42-44. MG argues that the required statistical analysis “is estimated to take approximately two months to ensure a quality evaluation.” Pet. at 10, citing Pet. Exh. L; *see* Tr. at 47-48. MG argues that, even if it followed an expedited schedule to collect and analyze groundwater samples, “the statistical analysis must be completed in less than one month.” *Id.* MG questions whether such an analysis “would be adequate to evaluate the full scope of the groundwater data collected.” Pet. at 10-11.

MG's Requested Relief

While MG has begun to collect required groundwater data, it requests a three-month extension of the deadline in Section 845.650(b)(1)(A) to comply with groundwater monitoring requirements. Pet. at 20, citing Pet. Exh. O. MG's compliance timeline accounts for samples to establish background concentrations. Pet. at 20, *see* Pet. Exh. L. MG argues that "the sampling events are adequately spaced in time so that they will be independent, and account for seasonal variability." Pet. at 20, citing Pet. Exh. I (¶9). MG also argues that its timeline includes sufficient time to analyze the sampling results and "develop site specific applications of groundwater protection standards for subsequent data comparisons and evaluations." Pet. at 20, citing Pet. Exh. I (¶13). MG seeks to extend the deadline by approximately three months to January 31, 2022. Pet. at 6, 22; MG Brief at 2, 8.

Arbitrary or Unreasonable Hardship

MG argues that, "[t]o qualify as 'independent samples,' the eight groundwater monitoring events must be conducted at not less than one-month intervals, which requires a minimum of eight months to complete" after installing monitoring wells. Pet. at 3. With an October 18, 2021 deadline, MG argues that "[i]t is not feasible to collect and analyze samples that comply with the well-established principles concerning seasonal variability or truly 'independent' samples." Pet. at 15, citing Pet. Exhs. L, I (¶11); *see* 35 Ill. Adm. Code 845.650(b)(1). MG states that "there is simply not enough time to thoroughly and adequately comply with the Illinois CCR Rule's six-month deadline." Pet. at 3.

Until the Board defined "inactive CCR surface impoundment," MG argues that it could not determine whether that term would include Ponds 1N and 1S. Pet. at 16. MG acknowledges that a 180-day deadline may be adequate for impoundments that can supplement existing groundwater data required by the federal rule. *Id.* at 15. However, MG argues that it cannot obtain accurate and reliable groundwater data by this deadline "despite taking all reasonable efforts to do so." *Id.* at 16. MG argues that a six-month period to collect and analyze groundwater samples arbitrarily and unreasonably shortens its time to establish background groundwater concentrations. Pet. at 15.

In its recommendation, IEPA acknowledges that "[i]ndependent samples provide greater statistical power when adequate time between sampling events can account for temporal variation such as seasonal variation in the data." Rec. at 13. IEPA recognizes that MG only recently began collecting the required eight independent groundwater samples." *Id.*, citing 35 Ill. Adm. Code 845.650(b)(1)(A).

IEPA agrees that the deadline "will not yield high quality background groundwater quality data." Rec. at 12. IEPA stresses, however, that the federal rules require new CCR surface impoundments and lateral expansions of CCR surface impoundments to "collect eight independent samples from each background well within the first six months of sampling." *Id.*, citing 40 CFR 257.94(b). IEPA argues that the quality of the background data under Part 845 would be comparable with data required by the federal rules. Rec. at 12. IEPA adds that this view is consistent with its position during the rulemaking that adopted Part 845. *Id.*, n.4, citing

Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 24-25 (Aug. 5, 2020) (pre-filed answers); slip op. at 138-39 (Aug. 13, 2020) (transcript).

Because MG has not considered Ponds 1N and 1S as federally-regulated CCR surface impoundments, it does not have background water quality data meeting the requirements of Part 845. Rec. at 12. IEPA notes that MG's available data are limited to dissolved (filtered) chemical constituents, while 35 Ill. Adm. Code 845.640(i) requires total (not filtered) chemical constituent analysis. *Id.* at 12-13. IEPA also notes that the data "do not include the full list of constituents required in 35 Ill. Adm. Code 845.600." *Id.* at 13.

MG began sampling new wells at Ponds 1N and 1S on May 3-4, 2021. Rec. at 13, citing Pet. at 10. Because MG only recently began to collect the required eight independent samples, IEPA acknowledges that MG "cannot meet the deadline of 180 days after April 21, 2021, to complete the sampling as provided in 35 Ill. Adm. Code 845.650(b)(1)(A)." Rec. at 13.

Based on these factors, IEPA "neither supports nor objects to MG's request for additional time." Rec. at 13; *see* Resp. at 1; MG Brief at 2.

Board Discussion

When it adopted a 180-day deadline to develop background data at 35 Ill. Adm. Code 845.650(b)(1), the Board recognized that "a longer monitoring period would allow the consideration of seasonal and temporal changes in establishing background groundwater quality." Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 71 (Feb. 4, 2021). However, the Board declined to extend the deadline, noting that the rules allow owners and operators to consider existing data. *Id.*

The Board agrees with MG and IEPA that existing groundwater data for Ponds 1N and 1S are not suitable to develop background concentrations because Part 845 does not allow filtered samples. Also, while MG may have been aware of proposed CCR rules for approximately one year before the Board adopted them, the Board recognizes that MG obtained the first sample from its expanded monitoring well system on May 3-4, 2021, a short time after the rules became effective. In addition, the Board agrees that a limited amount of additional time would allow MG to collect eight independent samples to develop representative background data. Also, IEPA's recommendation does not oppose granting MG's requested extension.

Based on these factors, the Board finds that the record supports MG's position that complying with the 180-day deadline to collect and analyze required groundwater monitoring data for Ponds 1N and 1S would impose an arbitrary or unreasonable hardship. The Board concludes to extend the deadline to comply with 35 Ill. Adm. Code 856.650(b)(1)(A) by approximately three months to January 31, 2022.

Section 845.230(d)(1): Initial Operating Permit Application

MG seeks a variance from Section 845.230(d)(1), entitled “Initial Operating Permit for Existing, Inactive and Inactive Closed CCR Surface Impoundments.” That provision requires that “[t]he owner or operator of an existing, inactive or inactive closed CCR surface impoundment who has not completed post-closure care must submit an initial operating permit application to the Agency by October 31, 2021.” 35 Ill. Adm. Code 845.230(d)(1); *see* Pet. at 1, 6.

MG’s Compliance Alternative

MG argues that an application for an operating permit “cannot be complete without the completed groundwater monitoring data.” Pet. at 12; *see* 35 Ill. Adm. Code 845.230(d)(2)(I)(iv). As summarized above, MG argues that it cannot obtain these data by the October 18, 2021 deadline. MG adds that its application must contain more than 22 technical submissions. Pet. at 12, citing 35 Ill. Adm. Code 845.230(d)(1). MG argues that it is “infeasible” and “not logistically possible” to meet the application deadline of October 31, 2021. Pet. at 12, 13, citing Pet. Exhs. I (¶17), N.

MG’s Requested Relief

MG requests an extension of the October 31, 2021 deadline to submit the initial operating permit under Section 845.230(d)(1). MG estimates that submitting a complete operating permit application “will take until March 31, 2022.” Pet. at 20. MG argues that its compliance timeline shows “feasible deadlines to meet the operating permit application requirements, including all required 22 technical components.” *Id.*, citing Pet. Exh. P. MG states that this timeline reflects “the resources available, and level of effort required to complete each task.” Pet. at 21, citing Pet. Exh. I (¶18). MG seeks to extend the permit application deadline by five months to March 31, 2022. Pet. at 1, 6.

Arbitrary or Unreasonable Hardship

Application Deadline. MG argues that, because it cannot collect complete groundwater data within the 180-day deadline, enforcing the deadline to submit an operating permit application would be arbitrary or unreasonable. Pet. at 16; *see* 35 Ill. Adm. Code 845.230(d)(1). MG asserts that an application lacking this complete groundwater data “would make the rest of the submission essentially meaningless.” Pet. at 16. It stresses that the rules do not “accommodate interruptions or delays caused by adverse weather, laboratory errors/issues, the unavailability of equipment, or ongoing restrictions due to the COVID-19 pandemic.” *Id.* at 17. MG argues that, with a variance allowing it to collect eight independent groundwater samples, it will have data “necessary to submit a complete operating permit application.” *Id.* at 3, 7. MG asserts that the permit application deadline should not deprive owners and operators adequate time to collect data and submit a complete and accurate application. *Id.* at 17.

In its recommendation, IEPA considers MG’s request to extend this permit application deadline as “unnecessary.” Rec. at 13. IEPA argues that 35 Ill. Adm. Code 845(d)(2)(I)(iv)

allows the initial operating permit application to include “a proposed monitoring program” when groundwater data or statistical procedures are not complete. *Id.* (emphasis in original). However, IEPA acknowledges that 35 Ill. Adm. Code 845.610(b)(1)(D) generally requires submitting a groundwater monitoring program without using the term “proposed.” *Id.* at 14. IEPA also acknowledges that extending the deadline “should yield a more complete and accurate operating permit application, which is an important consideration.” *Id.* at 16; *see* MG Brief at 2.

MG’s response disputes IEPA’s interpretation of the permit application submission requirements. Under that interpretation, MG argues that permit applicants can meet the application deadline without groundwater monitoring data required by Part 845. Resp. at 2. MG asserts that this results in different application requirements depending on whether groundwater data exist. Resp. at 2.

MG argues that IEPA’s interpretation lacks support. MG first asserts that it is not consistent with IEPA’s position during the rulemaking process, in which IEPA “testified that the groundwater monitoring data and statistical procedures for evaluating that data both must be submitted with the operating permit.” Resp. at 3.

In its questions, the Board asked MG to cite IEPA’s testimony. Board Questions at 1 (¶4c). MG responded with an excerpt from pre-filed answers submitted by IEPA in the Board’s CCR rulemaking. Tr. at 70-71; *see* Pet. Exh. U. In it, the Board noted that Section 845.230(d) requires “detailed groundwater monitoring information that must be submitted for Initial Operating Permit for Existing, Inactive and Inactive Closed CCR Surface Impoundments.” Pet. Exh. U at 157. The Board asked IEPA to comment why proposed Section 845.210 did not require similar information for construction permit applications or initial operating permits for new impoundments. *Id.* IEPA responded that the required groundwater monitoring data “is necessary to determining the current site characteristics and compliance status for existing CCR surface impoundments. This data will be used to determine the operational conditions or corrective action which might be necessary under the rule for these existing facilities.” Pet. Exh. U at 157. For new construction, IEPA responded that it would assess the need for groundwater monitoring when reviewing operating or construction permit applications. *Id.*

MG also argues that IEPA’s position contradicts Part 845. *Id.* Under 35 Ill. Adm. Code 845.230(d)(2)(I)(iii), the initial operating permit application “requires a groundwater sampling and analysis program that includes selection of the statistical procedures for evaluating the groundwater monitoring data under Section 845.640.” Resp. at 2. MG adds that 35 Ill. Adm. Code 845.640(f)(3) provides that an applicant must submit the chosen statistical method “in an operating permit application.” *Id.*; *see* MG Brief at 6-7

In its questions, the Board sought comment to clarify “whether statistical procedures for evaluating groundwater data are selected only after data collection is completed.” Board Questions at 1 (¶4a). Mr. Gnat testified that eight complete rounds of groundwater sampling are needed to begin statistical calculations. Tr. at 44-45.

The Board also sought comment on “whether the statistical procedures could be chosen on the basis of existing groundwater monitoring data.” Board Questions at 1 (¶4b). Mr. Gnat

testified that, without eight rounds of background data, “you can’t decide which path you’re going to take or which actual method you’re going to use.” Tr. at 45. He also addressed monitoring wells previously installed near Ponds 1N and 1S, which sample for dissolved metals while the federal and state CCR rules require sampling for total metals. Tr. at 46. While the separate monitoring results may be similar, he testified that “they’re not the same” and that any differences would be significant in statistical evaluations. *Id.* at 47.

Location Demonstration. Under 35 Ill. Adm. Code 845.350, CCR surface impoundments that do not comply with location restrictions are subject to 35 Ill. Adm. Code 845.700. Rec. at 14. Under 35 Ill. Adm. Code 845.700(a), when compliance has not been demonstrated, an owner or operator must initiate closure. Rec. at 14. CCR surface impoundments required to close under subsection (a) must immediately take steps to categorize the closure priority for the CCR surface impoundment and comply with the closure alternatives analysis. *Id.*, citing 35 Ill. Adm. Code 845.700(c). IEPA notes that MG seeks relief from 35 Ill. Adm. Code 845.700(c) “based on the lack of background groundwater quality data” for prioritizing closure. Rec. at 14.

Under 35 Ill. Adm. Code 845.230 and Subpart C, IEPA states that location restriction demonstrations must be submitted in the initial operating permit application by October 31, 2021. Rec. at 14, citing 35 Ill. Adm. Code 845.230(d)(1). IEPA adds that “[f]ailure to complete the location restriction demonstrations require owners or operators to initiate closure within six months.” Rec. at 14 (emphasis in original), citing 35 Ill. Adm. Code 845.700(d)(1). IEPA states that MG has not requested relief from 35 Ill. Adm. Code 845.700(d)(1) or Subpart C, “but the only requirement to complete the location restriction demonstrations is tied to submission of the operating permit application.” Rec. at 15.

IEPA argues that, if the Board does not extend MG’s operating permit application deadline and MG does not include its location restriction demonstrations in its application due in October 2021, then MG “would have to initiate closure by submitting a construction permit application by April 2022.” Rec. at 15. IEPA adds that “[f]ailure to comply with location restrictions requires owners or operators to immediately categorize and comply with closure alternatives analysis.” *Id.* (emphasis in original), citing 35 Ill. Adm. Code 845.700(a)(1), 845.700(c). IEPA argues that failure to comply is also a basis for it “to designate a CCR surface impoundment as Category 2, which would require a construction permit application to be submitted by February 1, 2022.” Rec. at 15; *see id.*, n.5, citing 35 Ill. Adm. Code 845700(g)(5).

However, IEPA asserts that, if the Board grants MG’s request to extend the deadline to calculate background groundwater quality and MG calculates that Category 6 applies, 35 Ill. Adm. Code 845(h)(3) sets August 2023 as the deadline to submit a construction permit unless IEPA exercises its option to change the category designation. Rec. at 15.

IEPA argues that it and MG understand that Ponds 1N and 1S do not meet the requirement for location above the uppermost aquifer. Rec. at 15, citing 35 Ill. Adm. Code 845.300. IEPA argues that “cracked poz-o-pac liners located one foot lower than average groundwater elevations” will not meet location restrictions and will also affect MG’s operating permit application. Rec. at 14, citing 35 Ill. Adm. Code 845.300. In its response, MG challenges

IEPA's position that it may not complete the required location restriction demonstration. Resp. at 5. It stresses that there is no evidence that it will not be able to do so, and that it has not requested relief from any location requirement. *Id.*

In its written questions, the Board asked MG to comment on whether it “plans to submit the location restriction demonstration along with the initial operating permit application on the proposed deadline of March 31, 2022.” Board Questions at 2 (¶7). Mr. Gnat testified the MG will submit the demonstration by that date. Tr. at 58.

IEPA further argues that, if MG had submitted category designations by May 21, 2021, it “could have already designated those CCR surface impoundments as Category 2 by the time of this filing or any time after the May 21, 2021 submission deadline.” Rec. at 15-16, citing 35 Ill. Adm. Code 845.700(c). IEPA adds that this would have required initiating closure by February 1, 2022, the deadline that applies to Category 4. Rec. at 16. IEPA states that extending MG's deadline to submit an operating permit “would simultaneously allow an additional extension of time to submit its location restriction demonstrations for Agency review,” delaying or preventing that designation. *Id.*

IEPA Recommendation. IEPA notes that MG requests only four to five additional months to submit applications for operating and construction permits, “with the same amount of time between the two as is allowed under Part 845.” Rec. at 16. IEPA states that “this is less than the six months allowed to initiate closure under Section 845.700(d)(1).” *Id.* IEPA adds that it is also earlier than if the Board extended the operating permit application deadline to March 2022 and MG failed to complete its locations restrictions demonstration. *Id.* Also, IEPA agrees that “an extension of time should yield a more complete and accurate operating permit application.” *Id.*

IEPA concludes that it “neither supports nor opposes” extending MG's deadline to submit its initial operating permit application. Rec. at 16; *see* Resp. at 1; MG Brief at 2.

Board Discussion

While IEPA argues that 35 Ill. Adm. Code 845.230(d) refers to a “proposed” groundwater monitoring program, the Board is not persuaded that this is consistent with the intent of the CCR rules. In addition, the Board agrees that it would be beneficial for MG and IEPA to have a complete and accurate operating permit application rather than submitting proposed or piecemeal information. As noted above, MG persuasively argued that necessary groundwater monitoring information and statistical procedures will not be available until January 31, 2022. Also, IEPA's recommendation does not oppose granting MG's requested extension.

Because the Board concluded above to extend the deadline to collect and analyze groundwater quality data, the Board finds that requiring MG to submit its initial operating permit application by October 30, 2021 would impose an arbitrary or unreasonable hardship. The Board concludes to extend the deadline to file the initial operating permit for Ponds 1N and 1S by five months from October 30, 2021, to March 31, 2022.

Section 845.700(c): Designating Closure Priority Category

MG requests a variance from Section 845.700(c), which addresses closing or retrofitting CCR surface impoundments and provides that,

[b]eginning on April 21, 2021, the owner or operator of the CCR surface impoundment required to close under subsection (a) [Required Closure], or electing to close under subsection (b) [Required Closure or Retrofit], must immediately take steps to categorize the CCR surface impoundment under subsection (g) [Closure Prioritization] and to comply with the closure alternatives analysis requirements in Section 845.710. Within 30 days after April 21, 2021, the owner or operator must send the category designation, including a justification for the category designation, for each CCR surface impoundment to the Agency for review. The owner or operator of the CCR surface impoundment must submit a construction permit application containing a final closure plan under the schedule in subsection (h). 35 Ill. Adm. Code 845.700(c); *see* Pet. at 1, 6.

MG's Compliance Alternative

MG projects that Ponds 1N and 1S may be either Category 4 “inactive CCR surface impoundments that have an exceedance of the groundwater protection standards” or Category 6, “inactive CCR surface impoundments that are in compliance with the groundwater protection standards.” 35 Ill. Adm. Code 845.700(g); *see* Pet. at 13. MG argues that categorization depends on groundwater monitoring results that cannot be available by the May 21, 2021 deadline. Pet. at 13, citing Pet. Exhs. L, N.

MG's Requested Relief

For Ponds 1N and 1S, MG expects to designate a closure priority category when it submits its operating permit application on March 31, 2022. Pet. at 21. Citing its proposed compliance timelines, MG states that, by the end of March 2022, it will collect necessary groundwater data and technical documents for its permit application. *Id.*, citing Pet. Exhs. O, P. MG projects that, at that time, it will have the information it needs to designate a closure priority category to include in operating permit applications. Pet. at 21. MG seeks to extend the deadline to designate closure priority by approximately 10 months “to March 31, 2022, concurrent with the initial operating permit application.” *Id.* at 6.

Arbitrary or Unreasonable Hardship

MG requests a variance from this requirement “because it does not have the information it needs to make this critically important categorization.” Pet. at 19; *see* 35 Ill. Adm. Code 845.700(c). MG explains that, without the underlying groundwater data, designating a category “would defeat the purpose of prioritization entirely.” *Id.*, citing 415 ILCS 5.22.59(g)(9); Pet. Exh. A at 26. MG argues that it would face an arbitrary or unreasonable hardship if it is required to make this designation by the deadline of May 21, 2021. Pet. at 18.

As noted above, MG argues that it cannot complete eight independent groundwater samples by the May 21, 2021 deadline. Pet. at 3. MG asserts that it “cannot accurately designate the closure priority category of either pond without groundwater monitoring data.” *Id.* at 1. Without these data, MG argues that its “only potential compliance option would be to guess at what the correct closure priority category designation should be for these ponds based on underdeveloped or incomplete information for the sake of making a timely submission.” *Id.* at 3.

In its recommendation, IEPA argues that, under 35 Ill. Adm. Code 845.700(g), every existing and inactive CCR surface impoundment falls into at least one closure prioritization category. Rec. at 18. “[I]f a CCR surface impoundment can be categorized in more than one category, the owner or operator of the CCR surface impoundment must assign the CCR surface impoundment the highest priority category,” *i.e.*, the category requiring closure sooner. Rec. at 18, *see* 35 Ill. Adm. Code 845.700(g)(2). IEPA asserts that Ponds 1N and 1S fall into either Category 4 or 6. Rec. at 18.

IEPA asserts that the Station “has conducted significant historical groundwater monitoring since at least 2010.” Rec. at 9, citing Rec. Exh. I. IEPA cites a 2012 violation notice that included exceedances of Class I groundwater quality standards in wells downgradient of Ponds 1N and 1S. Rec. at 9-10, citing Rec. Exh. A. MG entered into a Compliance Commitment Agreement (CCA), which included a requirement to establish a Groundwater Monitoring Zone (GMZ). Rec. at 10, citing Rec. Exh. E. The GMZ boundaries include Ponds 1N and 1S, where associated wells are monitored. Rec. at 10, citing Rec. Exhs. E, J. IEPA argues that recent monitoring data showing general exceedances of standards for boron, chloride, sulfate and total dissolved solids (TDS) show that Ponds 1N and 1S “may be contributing to groundwater contamination.” Rec. at 10, citing Rec. Exh. E, Table 2 at 7-8.

IEPA states that Class I groundwater quality standards for boron, chloride, sulfate, and TDS are the same concentrations as those in Part 845. Rec. at 7, citing 35 Ill. Adm. Code 620.410, 845.600. IEPA acknowledges that current groundwater quality data for Ponds 1N and 1S are “limited to dissolved (filtered) chemical constituents, instead of total (not filtered) chemical constituent analysis as required by 35 Ill. Adm. Code 845.640(i), and does not include the full list of constituents required in 35 Ill. Adm. Code 845.600.” Rec. at 10. However, IEPA argues that, “[e]xcept for natural variation in groundwater quality and laboratory or sampling variability, the concentrations of filtered boron, chloride, sulfate, and TDS samples should not yield higher concentrations than total analysis for those constituents.” *Id.* IEPA concludes that MG “could make informed conclusions to conservatively categorize Ponds 1N and 1S as Category 4 based on existing data. *Id.* at 11; *see id.* at 18. IEPA argues that “choosing the higher Category 4 and respective construction permit application submission date would be conservative but appropriately protective, especially considering the location of the CCR surface impoundments within the groundwater table.” Rec. at 19.

MG discounts IEPA’s position that there are sufficient groundwater quality data to categorize Ponds 1N and 1S. Resp. at 3, citing Rec. at 18. It argues that incomplete data from a single downgradient well do not provide an adequate basis to categorize the ponds, particularly in the absence of any statistical analysis. Resp. at 4. MG also argues that IEPA misinterprets 35 Ill. Adm. Code 845.700(g)(2). MG asserts that it addresses CCR surface impoundments

designated in more than one closure category and does not apply to CCR surface impoundments that have not been designated. Resp. at 3-4. MG concludes that “there is no harm caused by waiting a mere five months to collect the requisite data to accurately identify the Category designation for the basins.” *Id.* at 4.

The Board sought comment on whether Part 845 would allow MG “to redesignate the ponds as Category 6” if it initially designated Ponds 1N and 1S and Category 4 but new data support redesignation. Board Questions at 2 (§5a). MG contends that Part 845 may allow this redesignation. Tr. at 71. The Board also sought comment on unfavorable consequences that redesignation may have on closing Ponds 1N and 1S and on MG more generally. Board Questions at 2 (§5b). MG argued that, if it now begins preparing a construction permit application with incomplete data, some of that preparation may require revision or prove to be unnecessary. *See* Tr. at 71-72.

Noting MG’s position that “no harm” would result from a five-month extension, the Board sought comment on whether this harm “refers to any adverse environmental impact due to extension of the deadline to designate the closure priority category of the ponds.” Board Questions at 2 (§6a). Mr. Gnat noted that there were no downgradient potable water wells and no other human receptors in the area. Based on those factors, he did not foresee the risk of harm or an adverse environmental impact. Tr. at 58-59; *see id.* at 100-01.

IEPA agrees that categorizing closure priorities “will be more accurate if it considers established groundwater quality background.” Rec. at 19. IEPA adds that “the purpose of the category designation is to determine when the construction permit application is submitted, and IEPA prefers that the construction permit application, which includes the closure alternatives analysis and all of its requisite modeling, be complete and accurate to ensure that the closure method chosen is sufficiently protective.” *Id.*

IEPA concludes that it “neither supports nor opposes” submitting the category designation for Ponds 1N and 1S with the initial operating permit applications. Rec. at 19; *see* Resp. at 1.

Board Discussion

The Board agrees that designating Ponds 1N and 1S as Category 4 CCR surface impoundments based on existing groundwater data may be inaccurate because existing data do not meet Part 845 requirements. While IEPA may be able to redesignate the ponds’ closure category based on new data, the Board agrees that redesignation could have significant adverse consequences for MG without benefitting the environment or accelerating closure. The Board finds that requiring MG to designate Ponds 1N and 1S based on existing groundwater data would pose an arbitrary or unreasonable hardship. Also, IEPA’s recommendation does not oppose granting MG’s requested extension.

Above, the Board concluded to extend the deadlines to collect and analyze required groundwater monitoring data and to submit the operating permit application. The Board agrees with MG that sufficient groundwater data meeting the requirements of Part 845 will not be

available before May 21, 2021, to designate the closure priority category for Ponds 1N and 1S. Based on these factors, the Board extends the deadline to designate the closure priority of Ponds 1N and 1S by approximately 10 months to March 31, 2022.

Section 845.700(h)(1): Construction Permit Application

MG seeks a variance from Section 845.700(h)(1), which establishes an application schedule for closing and retrofitting and provides in its entirety that

Category 1, Category 2, Category 3, and Category 4 CCR surface impoundment owners or operators must submit either a construction permit application containing a final closure plan or a construction permit application to retrofit the CCR surface impoundment in accordance with the requirements of this Part by February 1, 2022. 35 Ill. Adm. Code 845.700(h)(1); *see* Pet. at 1, 6-7.

MG's Compliance Alternative

The closure priority category determines the construction permit application deadline. Pet. at 13, citing 35 Ill. Adm. Code 845.770(h). If groundwater monitoring results place Ponds 1N and 1S into Category 4, then MG must submit a construction permit application by February 1, 2022, approximately three months after MG's deadline to submit an operating permit application. Pet. at 13-14, citing 35 Ill. Adm. Code 845.700(h)(1). As summarized above, MG argues that it cannot meet that operating permit application deadline. If Pond 1N or 1S is in Category 4, MG "will also need more time to complete the construction permit application for these ponds because that application's content requirements build on the information presented in the operating permit application." Pet. at 14.

If Ponds 1N and 1S are both in Category 6, then MG does not need an extension of the August 1, 2023 construction permit application deadline for that category. Pet. at 14; *see* 35 Ill. Adm. Code 845.700(h)(3). While MG acknowledges that it may not need a variance from this deadline, it requests one because the time "between when this determination can be made and the deadline for submitting the construction permit application does not allow enough time to ensure that the Board can consider and rule upon a variance petition for an extension of the February 1, 2022 deadline." Pet. at 14. MG also argues that a later petition would not qualify for an automatic stay, risking noncompliance. *Id.* MG adds that its prospective request avoids spending the Board's time and other resources in a separate proceeding. *Id.*

MG's Requested Relief

If Ponds 1N and 1S are designated as Category 4 ponds, then MG projects that "it can submit the construction permit application by July 1, 2022." Pet. at 21. MG states that this is three months later than its requested operating permit application deadline of March 31, 2022." *Id.* MG argues that "[t]his is simply a request for the same amount of time to complete the construction permit application after the operating permit application is submitted that is provided in the Illinois CCR Rule." *Id.* MG requests an extension to July 1, 2022. *Id.* at 1-2, 6-7.

Arbitrary or Unreasonable Hardship

MG states that, once it has necessary groundwater data, it can designate an accurate closure priority for Ponds 1N and 1S. Pet. at 4. Because this designation determines the applicable construction permit application deadline under 35 Ill. Adm. Code 845.700(h), the data are needed to establish the permit application deadline. *Id.*

MG argues that, because it cannot determine a closure priority designation for Ponds 1N and 1S until at least March 2022, “it would not know what the applicable construction permit application deadline would be until after the February 1, 2022 Category 4 construction permit application deadline has already passed.” Pet. at 19; *see* 35 Ill. Adm. Code 845.700(h). It further argues that it would be an arbitrary or unreasonable hardship to require a deadline that “(a) may not be applicable; or (b) if applicable, is unreasonable because MG has demonstrated that it will not have the operating permit application completed by then.” Pet. at 19.

MG argues that this extension is commensurate with the deadline to submit a Category 4 construction permit application “after the operating permit application deadline that is otherwise established by the Illinois CCR Rule.” *Id.* at 2. MG argues that this extension would allow it to determine the appropriate construction permit application deadline. *Id.* at 7.

IEPA’s recommendation notes that, if the Board extends MG’s deadline to obtain background groundwater quality data, construction permit application deadlines for Categories 1-4 “will not be attainable.” Rec. at 20. IEPA acknowledges that, even if MG obtains these data by January 31, 2022, it would not have time to meet requirements for public notice and hearing. *Id.*, citing 35 Ill. Adm. Code 845.240. IEPA adds that the construction permit application must include a closure plan based on an analysis of closure alternatives. Pet. at 20., citing 35 Ill. Adm. Code 845.220(d)(2). The analysis must include modeling demonstrating that closure results in complying with groundwater quality standards. Pet. at 20, citing 35 Ill. Adm. Code 845.710(d)(2).

IEPA states that Part 845 allows a CCR surface impoundment six months to initiate closure if is required to do so because it fails to complete location restriction demonstrations. Rec. at 20, citing 35 Ill. Adm. Code 845.700(d)(1). IEPA argues that this six-month deadline is consistent with federal CCR regulations. Rec. at 20, citing 40 CFR 257.101. IEPA observes that MG’s proposed extension to July 1, 2022 “would provide approximately six months from the establishment of background to complete and submit a construction permit application.” Rec. at 21.

In its written questions, the Board noted that IEPA’s recommendation referred to exceedances of Class I groundwater quality standards for boron, chloride, sulfate, and TDS in certain downgradient monitoring wells. Board Questions at 2, citing Rec. at 10. The Board sought comment on the consequences “of extending the deadline for submitting a construction permit application on mitigating potential groundwater impacts.” Board Questions at 2 (¶6b).

Mr. Gnat testified that there are exceedances in both upgradient and downgradient wells, “and in some cases the upgradient wells had higher impacts than the downgradient wells.” Tr. at

59. He also distinguished sampling for dissolved constituents cited by IEPA from sampling for total constituents required by the Illinois CCR rules. *Id.* at 46. He also noted that data showed only a single exceedance of the chloride standard since 2010. *Id.* at 60. Based on these factors, he did not foresee any adverse effect resulting from and extended deadline. *Id.*

If the Board grants MG's request to extend the deadline to obtain background groundwater quality data, then IEPA "neither supports nor opposes the extension of time for the construction permit application for Ponds 1N and 1S." Rec. at 21; *see* Resp. at 1; MG Brief at 2.

Board Discussion

If the Board extends the deadline to collect and analyze required groundwater monitoring data to January 31, 2022, MG and IEPA agree that MWG cannot meet the February 1, 2022 deadline to apply for a construction permit. Above, the Board concluded to extend the deadline for groundwater monitoring and analysis. In addition, the Board finds that the requested extension of approximately five months is commensurate with the time otherwise established under Part 845. Also, IEPA's recommendation does not oppose granting MG's requested extension.

Based on these factors, the Board finds that the record supports MWG's position that complying with the February 1, 2022 deadline to submit the construction permit application for Ponds 1N and would impose an arbitrary or unreasonable hardship. The Board concludes to extend the deadline to submit the construction permit application for Ponds 1N and 1S by approximately five months from February 1, 2022 to July 1, 2022.

Compliance Costs

MG estimates total costs of \$104,000 to implement its proposed compliance plan, including installing new monitoring wells, "site clearing and grubbing, fence modifications, the eight rounds of groundwater sampling, and the statistical data evaluation." Pet. at 21, citing Pet. Exhs. I (¶20), K. MG adds that groundwater monitoring costs do not include an "estimate for the analytical results because these results would be part of a larger package of results for the Will County Stations." Pet. at 21, n.12.

MG also estimates costs of approximately \$50,000 to prepare an operating permit application and \$150,000 to prepare a construction permit application. Pet. at 21, citing Pet. Exhs. I (¶21), K.

IEPA's recommendation must include its "estimate of the costs that compliance would impose on the petitioner and on others." 35 Ill. Adm. Code 104.216(b)(5). IEPA "does not challenge Petitioner's cost estimates provided by its consultant for complying with the respective Part 845 requirements." Rec. at 5. IEPA adds that its "review of cost estimates submitted pursuant to Subpart I of Part 845 [Financial Assurance] is separate and distinct" and will not be limited by its position in the Recommendation. *Id.*, n.1.

MG states that immediate compliance with deadlines for data collection and submission would not increase costs. Pet. at 21, citing Pet. Exh. I (¶21). IEPA “does not believe there are any increased costs associated with immediate compliance.” Rec. at 5. MG argues that the cost would instead be “in the quality and thoroughness of the data collected and the information submitted.” *Id.*

Harm to the Public or the Environment

MG argues that its requested variance will not adversely affect the environment, MG stresses that Ponds 1N and 1S have long been subject to various federal and state requirements, including the Will County Station’s NPDES permit. Pet. at 22. It adds that its variance petition addresses only the timing of data collection and submission requirements and not the substantive requirements of Part 845. *Id.*; see MG Brief at 3, citing Tr. at 24, 61. MG asserts that “[t]he environment is better served by allowing MG the time it reasonably needs to collect the required information.” Pet. at 19. It argues that it would be arbitrary to require meeting strict deadlines that would result in submitting “underdeveloped or potentially inaccurate information that does not reasonably inform or guide future permitting decisions.” *Id.*

MG states that “there are no potable wells located downgradient of the Will County ash ponds.” *Id.* at 22, citing Pet. Exhs. D (¶17), G; see Pet. at 4. While two onsite wells are used only for the Station’s purposes, they are approximately 1,500 feet below ground surface beneath a confining layer of shale. MG argues that there is no potential impact to these wells from the Station’s ponds. Pet. at 22. MG concludes that “[p]ublic health will not be jeopardized by the requested variance relief.” *Id.*

Because Ponds 1N and 1S are inactive and have been dewatered, “they are unable to accumulate liquids.” Pet. at 4. MG argues that “[t]here is no ‘head’ in the ponds that could cause a release of ash constituents to groundwater.” *Id.* at 19. MG argues that the deadlines in Part 845 “confer no additional environmental benefit.” *Id.* at 19

MG adds that its requested deadline extensions are likely to have little effect on permitted activity at Ponds 1N and 1S. Mr. LeCrone testifies that IEPA expects to receive numerous detailed permit applications under Part 845. Tr. at 81-82, 83-85. He also testified that IEPA will thoroughly review each of these applications and that there is no deadline for IEPA to grant or deny an application. *Id.* at 83, 85. Noting that IEPA’s review may conceivably take a number of years, MG argues that no harm would result from allowing its requested deadline extensions. MG Brief at 4.

IEPA’s recommendation must include its “estimate of the injury that the grant of the variance would impose on the public, including the effect that continued discharge of contaminants will have on the environment.” 35 Ill. Adm. Code 104.216(b)(6). IEPA argues that “the Board is required to balance the petitioner’s hardship in complying with the Board regulations against the impact that the requested variance will have on the environment.” Rec. at 21, citing Monsanto Co. v. PCB, 67 Ill.2d 276, 292 (1977). IEPA adds that MG must establish that hardship resulting from denying its petition outweighs injury to the public and the environment from granting it and that “[o]nly if the hardship outweighs the injury does the

evidence rise to the level of an arbitrary and unreasonable hardship.” Rec. at 21, citing Marathon Oil Co. v. EPA, 242 Ill. App. 3d 200, 206 (5th Dist. 1993).

IEPA reports that it surveyed potable water wells through the publicly-available Source Water Assessment Protection Program (SWAP) website. Rec. at 22. Its survey did not identify any downgradient potable water wells. *Id.*, citing Rec. Exh. D. IEPA states that two potable wells cited in MG’s petition “are non-transient non-community water supply (NTNCWS) wells.” Rec. at 22; *see* Pet. at 22. Based on the depth of those wells “and the existence of a confining layer between the uppermost aquifer and the aquifer supplying the wells, the likelihood of impact from the Will County Station CCR surface impoundment is low.” Rec. at 22; *see* Pet. at 22.

IEPA states that, “[b]ecause Ponds 1N and 1S are located below average groundwater elevation elevations, the cracks in the poz-o-pac liners allow groundwater to seep into the ponds and for CCR constituents to leak out into the groundwater.” Rec. at 22. IEPA adds that downgradient monitoring wells MW-7 and MW-8 “continue to show exceedances of the Class I groundwater quality standards.” *Id.*, citing 35 Ill. Adm. Code 620.410. IEPA argues that placing CCR surface impoundment under enforceable operating permits would provide benefits to the public and the environment. Rec. at 22, citing 415 ILCS 5/22.59(a)(3), (a)(4), (g). IEPA stresses that these operating permits “are intended to go well beyond the scope of the facility’s NPDES permit” to address CCR surface impoundments. Rec. at 22-23, citing Pet. Exh. K. While IEPA acknowledges that establishing background concentrations provides a benefit, “delaying the permitting and closure of CCR surface impoundments does have implications for the public and the environment.” *Id.*

After weighing these factors, IEPA concludes that it does not either support or object to MG’s pending requests. Rec. at 23.

The Board recognizes IEPA’s position regarding groundwater contamination at the site. However, the Board concludes that requiring MG to close Ponds 1N and 1S based on groundwater monitoring data and analysis that may be incomplete or inaccurate would not benefit the public or the environment. In addition, the parties generally agree that there are no potable water wells located in the downgradient vicinity of Ponds 1N and 1S. Although there are two on site wells used by the Station, the parties also agree that a confining layer limits the potential impact of the ponds on those wells. While it generally agrees with IEPA that placing CCR surface impoundments under enforceable permits benefits the environment, the Board believes that such permits are best based on more complete and accurate information. Also, IEPA’s recommendation does not oppose granting the four pending extensions requested by MG.

The Board finds that granting MG the requested variance will not result in any significant adverse environmental impact or harm to the public when weighed against the arbitrary or unreasonable hardship posed by the immediate compliance with the regulatory deadlines. The Board agrees with MG that extending the regulatory deadlines by four to 10 months would allow MG to submit more complete and accurate information to IEPA.

Consistency with Federal Law

The Board's procedural rules require that "[a]ll petitions for variances from Title V of the Act or from 35 Ill. Adm. Code. Subtitle G, Ch. I "Waste Disposal" must indicate whether the Board may grant the requested relief consistent with RCRA (42 USC 6902 *et seq.*) and the federal regulations adopted under RCRA (40 CFR 256 through 258, 260 through 268, 273, 279, and 280)." 35 Ill. Adm. Code 104.208(d); *see* 35 Ill. Adm. Code 104.204(l).

MG argues that Ponds 1N and 1S are not federally-regulated as CCR surface impoundments. Pet. at 23. Because any regulation of these ponds exceeds the requirements of 40 CFR 257, MG argues that its proposed variance is consistent with federal law. *Id.*

MG stresses that its proposed variance seeks less than one year to collect eight groundwater samples required by 35 Ill. Adm. Code 845.650(b)(1)(A). Pet. at 23. It adds that this "is less than the 24 months permitted by the federal CCR rule." *Id.* MG argues that its proposed variance is "more consistent with federal requirements" because it allows MG to collect groundwater samples that are independent of one another. *Id.*, citing Pet. Exh. M (USEPA guidance).

IEPA's recommendation must include its "analysis of applicable federal laws and regulations and an opinion concerning the consistency of the petition with those federal laws and regulations." 35 Ill. Adm. Code 104.216(b)(7). IEPA agrees with MG that "the requested variances are not inconsistent with 40 CFR 257 and federal law does not provide any barrier to the granting of the relief requested." Rec. at 24.

The Board agrees that MG's requested extensions are not inconsistent with federal rules for CCR surface impoundments and that these rules do not provide a basis to deny MG's request.

MG's Proposed Variance Conditions

MG proposed that the Board grant its requested variance subject to conditions. Pet. at 22-23. IEPA's recommendation "neither supports nor opposes any of the conditions as proposed." Rec. at 26.

The Board finds that MG's proposed conditions appropriately implement its requested relief. The Board incorporates those conditions with nonsubstantive clarifications into its order below.

CONCLUSION

The Board finds that requiring MG to comply immediately with regulatory deadlines to collect and analyze required groundwater monitoring data, submit an initial operating permit application, designate a closure priority category, and submit a construction permit application for Ponds 1N and 1S would impose an arbitrary or unreasonable hardship. In addition, the Board finds that granting the requested relief will not result in any significant adverse environmental impact when weighed against the arbitrary or unreasonable hardship posed by immediate

compliance with the regulatory deadlines. The Board also finds that MG's requested relief is consistent with federal law. The Board therefore grants MG a variance from specified deadlines in 35 Ill. Adm. Code 845, subject to conditions specified in its order below.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

The Board grants Midwest Generation, LLC (MG) a variance from regulatory deadlines to collect and analyze required groundwater monitoring data (35 Ill. Adm. Code 845.650(b)(1)(A)), submit an initial operating permit application (35 Ill. Adm. Code 845.230(d)(1)), designate a closure priority category (35 Ill. Adm. Code 845.700(c)), and submit a construction permit application (35 Ill. Adm. Code 845.700(h)(1)) for Ponds 1N and 1S at its Will County Station located at 529 East Romeo Road, Romeoville, subject to the following conditions:

1. The variance applies only to Ponds 1N and 1S at MG's Will County Station.
2. MG must collect and analyze eight independent samples from each background and downgradient well for all constituents with a groundwater protection standard listed in 35 Ill. Adm. Code 845.600(a) and also for Calcium and Turbidity as required by 35 Ill. Adm. Code 845.650(b)(1)(A) by January 31, 2022.
3. MG must submit the operating permit application required by 35 Ill. Adm. Code 845.230(d)(1) for Ponds 1N and 1S to the Illinois Environmental Protection Agency (IEPA) by March 31, 2022.
4. MG must submit the closure category designation required by 35 Ill. Adm. Code 845.700(c) for Ponds 1N and 1S to IEPA by March 31, 2022.
5. If MG designates Ponds 1N and 1S as Category 4 CCR surface impoundments, then it must submit the construction permit application required by 35 Ill. Adm. Code 845.700(h)(1) to IEPA by July 1, 2022.
6. If MG does not designate Ponds 1N and 1S as Category 4 CCR Surface Impoundments, no variance relief from the construction permit application deadline has been requested or granted.
7. The variance begins on May 11, 2021.
8. The variance ends on March 31, 2022, if MG does not designate Ponds 1N and 1S as Category 4 CCR Surface Impoundments under 35 Ill. Adm. Code 845.700(g). The variance ends on July 1, 2022, if MG designates Ponds 1N and 1S as Category 4 CCR Surface Impoundments.

IT IS SO ORDERED.

If the petitioner accepts this variance, the petitioner must within 35 days of the date of this opinion and order, on or before Thursday, October 14, 2021, file with the Board, and serve upon IEPA, an executed certificate of acceptance, signifying the petitioner's agreement to be bound by all terms and conditions of the variance. "A variance and its conditions are not binding upon the petitioner until the executed certificate is filed with the Board and served on [IEPA]. Failure to timely file the executed certificate with the Board and serve a copy on [IEPA] renders the variance void." 35 Ill. Adm. Code 104.240. The certificate form follows this Board order as an appendix.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2020); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
Midwest Generation, LLC Attn: Kristin L. Gale Susan M. Franzetti Molly Snittjer Nijman Franzetti, LLP 10 S. LaSalle St., Suite 3600 Chicago, Illinois 60603 kg@nijmanfranzetti.com sf@nijmanfranzetti.com ms@nijmanfranzetti.com	Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601 don.brown@illinois.gov
Illinois Environmental Protection Agency Attn: Christine Zeivel Stefanie Diers Clayton Ankney 1021 North Grand Ave. East Springfield, Illinois 62794-9276 Christine.Zeivel@Illinois.gov Stefanie.Diers@Illinois.gov Clayton.Ankney@Illinois.gov	

I, Timothy J. Fox, Acting Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 9, 2021, by a vote of 4-0.

A handwritten signature in black ink, appearing to read "Timothy J. Fox". The signature is written in a cursive, somewhat stylized font.

Timothy J. Fox, Acting Clerk
Illinois Pollution Control Board

CERTIFICATE APPENDIX

CERTIFICATE OF ACCEPTANCE

I, _____, having read the opinion and order of the Illinois Pollution Control Board in docket PCB 21-108, dated September 9, 2021, understand and accept the opinion and order, realizing that this acceptance renders all terms and conditions of the variance set forth in that order binding and enforceable.

Petitioner: MIDWEST GENERATION, LLC

By: _____
Authorized Agent

Title: _____

Date: _____